RS Muthiah v Pembinaan Fiba Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22–134 OF 1999
BALIA YUSOF JC
11 MAY 2004

Legal Profession — Duty to client — Conflict of interest — Defendant solicitor acting as secretary to defendant company — Whether personal relationship between defendant solicitor and defendant witness exists — Whether a bar to act for defendant — Whether professional independence can be maintained — Whether pecuniary interest proven — Legal Profession (Practice & Etiquette) Rules 1978 rr 3(b)(ii), 5 and 27(a)

This was a interlocutory application filed by the plaintiff to disqualify Pn Malliga of Messrs Malliga & Associates from representing the defendant and further and in the alternative from handling matters of the defendant. The application was filed on the following grounds: (i) Pn Malliga, an advocate and solicitor was the wife of one Balachandran, the managing director of the defendant company and also the main witness for the defendant; (ii) that there arose a conflict of interest on the part of Messrs Malliga & Associates who has previously acted for the plaintiff; (iii) thirdly, Pn Malliga was acting as secretary to the defendant company and therefore as a secretary to the defendant company Pn Malliga would have a pecuniary interest in the said company and should be barred from acting for the defendant; (iv) and lastly, it was contended by the plaintiff that on the facts and circumstances of the case, it was difficult for Pn Malliga to maintain her professional independence in dealing with the matter.

A preliminary objection was further raised on the grounds that the plaintiff/applicant had failed to reply to the averments made by the defendant in the affidavit in reply filed by the defendant.

Held, allowing the application with costs:

(1) With regards to the preliminary objection, it is trite law that only a positive assertion upon a material issue which must be contradicted in the evaluation of affidavit evidence, the failure of which would be deemed to be an admission by the party. In the present case, there were no such positive assertions which needed specific reply by the plaintiff and being material for the determination of the matter and therefore the preliminary objection raised by the defendant was unsubstantiated and without basis (see para 2).

(2) Rule 3 of the Legal Profession (Practice and Etiquette) Rules 1976 states that an advocate and solicitor should not accept a brief if he is embarrassed: Rule 3(b)(ii) of the said Rules further states that an embarrassment arises where there is a personal relationship between the advocate and solicitor and a party or witness in the proceedings (see para 4).

(3) As Mr Balachandran wife, Pn Malliga clearly had a personal relationship with Mr Balachandran and by virtue of r 3 was thereby prohibited from acting for the defendant (see para 7).

(4) The fact that Messrs Malliga & Associates had in a previous case acted for the plaintiff could give rise to the possibility of a conflict of interest as the plaintiff alleged that Pn Malliga had access to documents and other confidential documents pertaining to the plaintiff. That being the case justice might not be seen to be done (see para 8).

(5) The fact that Pn Malliga was a secretary to the defendant company and might have a pecuniary interest in this case must be taken into consideration. Rule 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978 clearly spells out that an advocate and solicitor shall not appear in any matter in which he has a direct pecuniary interest (see para 8).

(6) Pn Malliga, being the secretary of the defendant company, was pecuniarily interested in the defendant company and ought to be prohibited from acting for the company in this instance. Maintaining professional independence has always been the hallmark of a solicitor in handling a matter, and it was for that reason that r 5 of the Legal Profession (Practice & Etiquette) Rules 1978 had been legislated. Sub-rule 5(a) of the said Rules prohibits a solicitor from accepting a brief if such acceptance renders it difficult to maintain professional independence or is incompatible with the administration of justice (see paras 9 and 10).

(7) It would be impossible for Pn Malliga to maintain her professional independence considering her relationship with the main witness of the case and her position as secretary of the defendant company. Based on the reasons aforesaid, the application by the plaintiff for Pn Malliga to withdraw herself from handling the matter was allowed with costs (see paras 10 and 14).

[**Bahasa Malaysia summary**

Ini merupakan permohonan intelokutori yang difailkan oleh plaintif untuk supaya Pn Malliga dari Tetuan Malliga & Associates diisytiharkan tidak layak untuk mewakili pihak defendan dan seterusnya secara alternatif dari mengendalikan perkara-perkara yang berhubungan dengan plaintif. Permohonan ini telah difailkan berdasarkan alasan-alasan yang berikut: (i) Pn Malliga, seorang peguamcara & peguambela adalah isteri kepada En Balachandran a/l Kandasamy, pengarah pengurusan syarikat defendan dan juga saksi utama pihak defendan; (ii) adalah seterusnya dinyatakan bahawa isu konflik kepentingan timbul berdasarkan yang Tetuan Malliga & Associates pernah mewakili pihak plaintif pada satu masa dahulu; (iii) Pn Malliga juga merupakan setiausaha kepada syarikat defendan dan oleh yang demikian mempunyai kepentingan kewangan (pecuniary interest) di dalam kes ini dan sepatutnya dihalang dari mewakili pihak defendan; (iv) akhirnya, pihak plaintif menyatakan bahawa berdasarkan fakta-fakta keseluruhan kes tersebut, adalah sukar untuk Pn Malliga mengekalkan kebebasan profesionalnya semasa mengendalikan kes ini.

Seterusnya pihak defendan telah mengemukakan bantahan awal berdasarkan alasan yang plaintiff telah gagal menjawab isu-isu material di dalam affidavit defendan yang telah diikrar oleh En Balachandran.

Diputuskan, membenarkan permohonan tersebut: **A**

(1) Berhubung bantahan awal yang dikemukakan, hanya pernyataan yang positif yang dikemukakan berkaitan isu material yang perlu dinafikan di mana kegagalan berbuat demikian akan dianggap sebagai pengakuan oleh pihak berkenaan. Di dalam kes ini, tidak ada penyataan positif yang perlu dijawap secara terperinci oleh plaintif yang material untuk penyelesaian kes ini dan oleh yang demikian memutuskan bahawa bantahan awal yang dikemukakan oleh defendan adalah tidak substantif dan tidak berasas (lihat perenggan 2). **B**

(2) Kaedah-kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978 jelas menyatakan bahawa seorang peguamcara dan peguambela tidak seharusnya menerima sebarang kes yang akan memalukannya. Kaedah 3(b)(ii) seterusnya menyatakan bahawa kejadian ini akan timbul di mana terdapat pertalian peribadi di antara peguamcara & peguambela tersebut dan saksi ataupun salah satu pihak di dalam prosiding (lihat perenggan 4). **C**

(3) Adalah jelas bahawa Pn Malliga sebagai isteri En Balachandran mempunyai pertalian peribadi dengannya dan berdasarkan k 3 dihalang dari mewakili pihak defendan (lihat perenggan 7). **D**

(4) Oleh kerana Pn Malliga telah mewakili plantif pada satu masa dahulu, situasi ini mungkin menimbulkan konflik dalam kepentingan di mana Pn Malliga mungkin telah mempunyai akses kepada dokumen-dokumen sulit berhubung dengan plaintif pada masa yang berkenaan. Oleh yang demikian keadilan tidak akan dilaksanakan (lihat perenggan 8). **E**

(5) Fakta yang seterusnya yang patut dipertimbangkan adalah bahawa PnMalliga merupakan setiausaha kepada syarikat defendan and mungkin mempunyai kepentingan kewangan di dalam kes ini. Kaedah 27(a) Profesyen Undang-Undang (Amalan dan Kesopanan) 1978 jelas menyatakan bahawa seorang peguamcara dan peguambela tidak seharusnya bertindak di dalam kes di mana beliau dengan secara langsung mempunyai kepentingan kewangan (lihat perenggan 8). **F**

(6) Puan Malliga dengan menjadi setiausaha syarikat defendan mempunyai kepentingan kewangan dalam syarikat defendan dan beliau sepatutnya dilarang daripada mewakili defendan di dalam perkara ini. Mengekalkan kebebasan profesional telah menjadi ciri khusus seorang peguambela dan peguamcara bila mengendalikan mana-mana kes dan Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978 telah digubal berdasarkan ini. Kaedah tersebut melarang seorang peguamcara dari menerima sebarang kes jikalau kebebasan profesionalnya tidak dapat dikekalkan ataupun kes tersebut tidak selaras dengan kepentingan pentadbiran keadilan (lihat perenggan 9 dan 10). **G** **H**

(7) Adalah mustahil untuk Pn Malliga mengekalkan kebebasan profesionalnya memandangkan pertaliannya dengan saksi utama kes ini dan kedudukannya sebagai setiausaha syarikat defendan. Berdasarkan alasan-alasan tersebut, permohonan oleh plaintif untuk Pn Malliga mengundur diri beliau daripada mengendalikan perkara tersebut dibenarkan dengan kos (lihat perenggan 10 dan 14).] **I**

Notes

For cases on conflict of interests, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1605–1612.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)
Black v Taylor [1993] 3 NZLR 403 (refd)
Carlingwood Motors Ltd v Nissan Canada Inc [2001] ACWSJ 676321
Haji Abdul Ghani bin Ishak & Anor v PP [1981] 2 MLJ 230 (refd)
Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors: Uma Devi d/o R Balakrishnan (third party) [2003] 6 MLJ 703 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak [1997] 5 MLJ 705 (refd)
Vijayalakshmi Devi Nadchatiram v Saraswathy Devi Nadchatiram [2000] 4 CLJ 870 (refd)
Yee Chang & Co Ltd v NV Koninklijke Paketvaart Maatschappij [1958] MLJ 131 (refd)

Legislation refered to

Legal Profession (Practice & Etiquette) Rules 1978 r 3(b)(ii), 5, (a), 27(a)

Balia Yusof JC:

By way of a summons in chambers, the plaintiffs filed an application to disqualify Pn Malliga a/p GV Sumathri of Messrs Malliga & Assoc from representing the defendant and further and in the alternative Messrs Malliga & Assoc from handling the matters of the defendant. The application is grounded firstly, on the basis that the said Pn Malliga, an advocate and solicitor is the wife of one Balachandran a/l Kandasamy who is the managing director of the defendant company. Mr Balachandran is the main witness for the defendant. Secondly, it is submitted that there arises a conflict of interest on the part of Messrs Malliga & Assoc who has acted for the plaintiff at one time. Thirdly, it was contended by the plaintiff that as a secretary to the defendant company, Pn Malliga has a pecuniary interest in the case and as such she should be barred from acting for the defendant company. And lastly it is further contended by the plaintiff that on the facts and circumstances of the case, it is difficult for the said Pn Malliga to maintain her professional independence in dealing with the matter.

[1] In reply to the above, the defendant submits that Messrs Malliga & Assoc and the defendant company are separate legal entities and as such there is no question of embarrassment. Pn Maliga was never in possession of any confidential documents belonging to the plaintiff and this is not prejudicial to the plaintiff and would not be in conflict. It is further submitted by the defendant that being the secretary of the defendant company is no bar to her acting for the defendant.

[2] I shall now deal with each of the grounds raised by the plaintiff and the reply by the defendant. Firstly, the defendant has raised a preliminary

objection on the issue that the plaintiff/applicant has failed to make any reply to the averments made by the defendant in encl 34. The said affidavit in reply was affirmed by one Balachandran a/l Kandasamy, the Managing Director of the defendant company. In her written submission (encl 39), learned counsel for the defendant, Pn Malliga herself has quoted such authorities as *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 and the case of *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 to support her contention. While I fully agree with the proposition of law in the said cases cited by the counsel, it is the duty of the counsel to show and ascertain what are the so called material averments which the plaintiff has failed to reply and whether those averments are material in the first place. This has not been done and I am not in a position to fathom the learned counsel's contention as to which of these averments are material and which need a specific reply by the plaintiff, the failure of which could be fatal to their case. In any event after having perused both the affidavits of the plaintiff and the defendant, I do not find any such positive averments which needed specific reply by the plaintiff and being material for the determination of the matter. It is trite law that only a positive assertion upon a material issue which must be contradicted in the evaluation of affidavit evidence, the failure of which would be deemed to be an admission by the party. On the aforesaid reasons, I found the preliminary objection raised by the learned counsel for the defendant to be unsubstantiated and without basis, and accordingly proceed to consider the application on its merits.

[3] On the issue of embarrassment, r 3 of the Legal Profession (Practice and Etiquette) Rules 1978 states:

> Advocate and solicitor not to accept brief if embarrassed.
>
> (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.
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> (b) An embarrassment arises:
>
> (i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;
>
> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.

[4] In so far as Pn Malliga is concerned, it is an undisputed fact that she has a personal relationship with Mr Balachandran a/l Kandasamy, the Managing Director of the defendant company. Mr Balachandran a/l Kandasamy is the husband of Pn Malliga. Mr Balachandran a/l Kandasamy is also the main witness for the defendant in the case. Rule 3(b)(ii) above clearly spells out the meaning of embarrassment namely 'where there is some personal relationship between him (the advocate and solicitor) and a party or a witness to the proceedings'.

[5] The meaning of 'personal relationship' has been considered by the Federal Court in *Vijayalakshmi Devi Nadchatiram v Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870 by referring to its ordinary meaning and at p 875 of the report this is what the court said:

What does come within the ambit of 'personal relationship'? By its ordinary *Concise Oxford Dictionary's* meaning of relationship is 'the fact or state of being related' and 'personal' is relating to or connected with the person. Or to take the meaning of 'relation' in the Jowitt's *Dictionary of English Law* it means 'a general word meaning prima facie next of kin of any degree or colloquially, kindred of all degrees'.

[6] Earlier at the same page, the Federal Court referred to a passage in the judgment of the court of appeal in the matter which reads:

> A personal relationship between a solicitor and his client can only mean a relationship (meaning an association) which is personal between them. A working relationship between partners of a firm is not a personal relationship, so that a lawyer can always act for his firm. A sexual relationship between two people is a personal relationship. But a solicitor and client relationship is not a personal relationship. However, there would be a personal relationship between them if their association is something which is more than that of a professional one.

[7] In my judgment, Pn Malliga certainly has a personal relationship with Mr Balachandran a/l Kandasamy and is thereby prohibited by r 3 of the Legal Profession (Practice and Etiquette) Rules 1978 from acting for the defendant in the proceedings.

[8] The next ground of objection against Pn Malliga acting for the defendant in the matter is on the issue of conflict of interest. It is alleged by the applicant that the firm Messrs Malliga & Associates had acted for the plaintiff and had access to documents and other confidential information pertaining to the plaintiff at the time when they were so acting for the plaintiff. The plaintiff has produced exhs 'A' and 'B' in encl 32 to prove their point, however my perusal of those two exhibits relates to one Mr Gengiah s/o Ramasamy and Janakiraman s/o Govindan whose connection with the plaintiff in this case is not clearly shown to the court. However the exhibits did indicate that the two named persons are the officers of the Persatuan Dravidian Malaysia and the plaintiff in the instant case is suing for and on behalf of the Jawatankuasa Pengurusan Persatuan Dravidian Malaysia. Such being the situation, it appears that Puan Malliga may be caught in a very peculiar situation of having acted for the Persatuan earlier and now being its adversary. In this regard, perhaps I should refer to the decision of the New Zealand Court of Appeal in the case of *Black v Taylor* [1993] 3 NZLR 403 where it was held that 'the court may prevent a barrister acting as counsel in a matter which he had a conflict, or in which he appeared to have a conflict of interest such that justice would not be seen to be done'. On the facts before me, it certainly appears that Pn Malliga may have a conflict of interest in dealing with the matter, such that justice may not be seen to be done. In coming to this conclusion, I have also considered the fact that Pn Malliga is also a secretary to the defendant company which is another ground of objection by the plaintiff. Being in that position, the plaintiff contends that Pn Malliga has a pecuniary interest in the case and is thereby prohibited by the provisions of r 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which states:

> An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.

[9] In *Haji Abdul Ghani bin Ishak & Anor v PP* [1981] 2 MLJ 230, Wan Yahya J (as he then was) expressed the view that any interest relating to money or moneys worth, any interest that could be converted into money, or any interest the object of which is to make money falls in the category of pecuniary interest. I respectfully share the same view as his lordship and in so doing I have no hesitation in holding that Pn Malliga being the secretary of the company in pecuniarily interested in the defendant company and therefore she ought to be prohibited from acting for the company in the matter. It is my considered view that as an officer of the court, a solicitor must always conduct himself with decorum and avoid any situation which may give rise to a conflict of interest. Again when a solicitor is pecuniarily interested in a matter the rule of prudence and good sense dictates that he should abstain from taking up the matter.

[10] Maintaining professional independence has always been the hallmark of a solicitor in handling a matter, and it is for that reason that r 5 of the Legal Profession (Practice and Etiquette) Rules 1978 has been legislated. Sub rule 5(a) of the said Rules prohibits a solicitor to accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice. Considering the whole scenario of the case, I am of the considered view that, it would be impossible for Pn Malliga to maintain her professional independence in the matter considering the relationship she has with the main witness of the case and her position as a secretary of the defendant company. It must always be stressed that the right to counsel is not without limitation. In this respect perhaps it is worth repeating what Abdul Malik Ishak J stated in *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 5 MLJ 705 where his Lordship stated at p 725:

> The rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right.

[11] On the same note, Zulkifli J in *Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors: Uma Devi d/o R Balakrishnan (third party)* [2003] 6 MLJ 703 spoke of the inherent powers of the court. At p 710 of the report, his Lordship quoted a passage from the Canadian case of *Carlingwood Motors Ltd v Nissan Canada Inc* [2001] ACWSJ 676321 which states as follows:

> As has been noted, this court's jurisdiction to remove lawyers from the record is not to be found in a code of conduct but in the fact that lawyers are officers of the court and their conduct on legal proceedings which may affect the administration of justice is subject to the court's supervisory jurisdiction.

[12] Whyatt CJ, in his judgment in *Yee Chang & Co Ltd v NV Koninklijke Paketvaart Maatschappij* [1958] MLJ 131 at p 133 said:

> It has been said by Lord Wright in *Myers v Elman* (1940) AC 282 at p 319, that the court has a right and a duty to supervise the conduct of its solicitors and the court

would be failing in the discharge of that duty if it passed over the conduct of the defendant's solicitors in this litigation in silence. It has been laid down by the House of Lords in *Myers v Elman* that a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice.

[13] Finally, I am constrained to say that the court as the guardian of justice will fail in its duty should it allow the provisions of the Legal Profession (Practice and Etiquette) Rules 1978 to be flagrantly violated. Due observance and effect must be given to its provisions. This is essential for an effective and respectable Bar. Speaking of its provisions, the Federal Court in *Vijayalakshmi Devi Nadchatiram*'s case at p 880 observed:

> The objective of the provision lies in the fact that the Bar had set a high standard of practice. The Bar requires that an advocate and solicitor must be able to give an objective and independent judgment before he embarks on the task of advising a client. Thus the advocate and solicitor would not be in a position to do so if he is bound by ties of personal relationship to his client and tied by pecuniary interest. The mischief to be cured and the intention of the Rules are too clear to be ignored. The provisions are too clear to admit of any doubt or dispute. They had been so framed to preserve the integrity of an advocate and solicitor so that he may not be in conflict of interest and by the same token ensures that when he acts for a client he is independent and free vis-à-vis both when representing the client and performing his duty as an officer of the court in which he appeared.

[14] For the reasons aforesaid, the application by the plaintiff for Pn Malliga a/p GV Sumathri to withdraw herself from handling the above matter is hereby allowed in the terms of prayer (a) in encl 31 with costs.

Application allowed with costs.

Reported by Jeyanthi Mala